Supreme Court, U.S.
FILED

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No. 03 546 OCT 6 - 2003

IN THE

Supreme Court of the United States

PETER THOSTESON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner became president of a failing small business and shortly thereafter filed for bankruptcy protection for the business. The former president had stolen payroll withholding taxes and absconded, and his whereabouts are now unknown. Prior to and while the company was under the jurisdiction of the bankruptcy court, Petitioner made partial payments of the back payroll taxes to the Internal Revenue Service and made payments to other creditors with the dwindling resources of the failing company. Instead of pursuing the old president or availing itself of bankruptcy remedies against the company, the Government assessed a payroll tax penalty of over $1 million against the Petitioner personally. The question presented is:

> Whether the payroll tax penalty provision of 26 U.S.C. § 6672, which requires that a responsible person "willfully" fail to pay over withheld taxes to the Government, applies to an employee who has reasonable cause for not remitting such taxes.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Thosteson v. United States*, 331 F.3d 1294 (11th Cir. 2003), and is reproduced in the Appendix to this Petition ("Pet. App.") at 1a-12a. The Court of Appeals' order denying rehearing is unpublished, but is reproduced at Pet. App. 24a. The opinion of the United States District Court for the Middle District of Alabama is reported at 182 F. Supp. 2d 1189 (M.D. Ala. 2001), and is reproduced at Pet. App. 13a-20a. The order of the District Court modifying its opinion is not reported, but is reproduced at Pet. App. 21a-23a.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on June 2, 2003. The Court of Appeals denied a timely petition for rehearing on July 9, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 6672 of title 26, United States Code.

Section 6672. Failure to Collect and Pay Over Tax, or Attempt to Evade or Defeat Tax.

(a) Any person required to collect, truthfully account for, and pay over any tax imposed by this title who *willfully* fails to collect such tax, or truthfully account for and pay over such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 of part II of subchapter A of chapter 68 for any offense to which this section is applicable.

(b) Preliminary notice requirement.—

(1) In general.—No penalty shall be imposed under subsection (a) unless the Secretary notifies the taxpayer in writing by mail to an address as determined under section 6212(b) or in person that the taxpayer shall be subject to an assessment of such penalty.

(2) Timing of notice.—The mailing of the notice described in paragraph (1) (or, in the case of such a notice delivered in person, such delivery) shall precede any notice and demand of any penalty under subsection (a) by at least 60 days.

(3) Statute of limitations.—If a notice described in paragraph (1) with respect to any penalty is mailed or delivered in person before the expiration of the period provided by section 6501 for the assessment of such penalty (determined without regard to this paragraph), the period provided by such section for the assessment of such penalty shall not expire before the later of—

(A) the date 90 days after the date on which such notice was mailed or delivered in person, or

(B) if there is a timely protest of the proposed assessment, the date 30 days after the Secretary makes a final administrative determination with respect to such protest.

(4) Exception for jeopardy.—This subsection shall not apply if the Secretary finds that the collection of the penalty is in jeopardy.

(c) Extension of period of collection where bond is filed.—

(1) In general.—If, within 30 days after the day on which notice and demand of any penalty under subsection (a) is made against any person, such person—

(A) pays an amount which is not less than the minimum amount required to commence a proceeding in court with respect to his liability for such penalty,

(B) files a claim for refund of the amount so paid, and

(C) furnishes a bond which meets the requirements of paragraph (3), no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until a final resolution of a proceeding begun as provided in paragraph (2). Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court. Nothing in this paragraph shall be construed to prohibit any counterclaim for the remainder of such penalty in a proceeding begun as provided in paragraph (2).

(2) Suit must be brought to determine liability for penalty.—If, within 30 days after the day on which his claim for refund with respect to any penalty under subsection (a) is denied, the person described in paragraph (1) fails to begin a proceeding in the appropriate United States district court (or in the Court of Claims) for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the 30-day period referred to in this paragraph.

(3) Bond.—The bond referred to in paragraph (1) shall be in such form and with such sureties as the Secretary may by regulations prescribe and shall be in an amount equal to 1 1/2 times the amount of excess of the penalty assessed over the payment described in paragraph (1).

(4) Suspension of running of period of limitations on collection.—The running of the period of limitations provided in section 6502 on the collection by levy or by

a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

(5) Jeopardy collection.—If the Secretary makes a finding that the collection of the penalty is in jeopardy, nothing in this subsection shall prevent the immediate collection of such penalty.

(d) Right of contribution where more than 1 person liable for penalty.—If more than 1 person is liable for the penalty under subsection (a) with respect to any tax, each person who paid such penalty shall be entitled to recover from other persons who are liable for such penalty an amount equal to the excess of the amount paid by such person over such person's proportionate share of the penalty. Any claim for such a recovery may be made only in a proceeding which is separate from, and is not joined or consolidated with—

(1) an action for collection of such penalty brought by the United States, or

(2) a proceeding in which the United States files a counterclaim or third-party complaint for the collection of such penalty.

(e) Exception for voluntary board members of tax-exempt organizations.—No penalty shall be imposed by subsection (a) on any unpaid, volunteer member of any board of trustees or directors of an organization exempt from tax under subtitle A if such member—

(1) is solely serving in an honorary capacity,

(2) does not participate in the day-to-day or financial operations of the organization, and

(3) does not have actual knowledge of the failure on which such penalty is imposed.

The preceding sentence shall not apply if it results in no person being liable for the penalty imposed by subsection (a).

(Emphasis added.)

STATEMENT OF THE CASE

This is an action for refund of a payroll tax penalty assessed against an individual officer, Petitioner Peter Thosteson, of a corporation, Lorac, Inc. ("Lorac"). Lorac was an employee leasing company. It conducted business by entering into contracts with companies—clients—whereby Lorac would hire all of the client's employees and then lease the employees back to the client. Lorac would provide payroll, insurance, and human resource services to the clients. Lorac's duties included processing of payroll, Federal Unemployment Tax Act ("FUTA") contributions, federal income tax withholdings, and payroll tax returns (Forms 940 and 941). Clients would transfer funds to Lorac, and Lorac would remit the taxes to the Government.

From the date of its formation in 1993 until November 1995 Garner Umphrey was the sole or controlling shareholder of Lorac. Peter Thosteson, Petitioner, was initially Lorac's vice-president in charge of marketing, with his main responsibility being sales. Petitioner had limited authority to hire and fire employees, to set salaries and wages, to determine financial policy, to pay employees, and to enter into loan agreements. Petitioner's limited authority was subject to the ultimate approval of Umphrey.[1] Any checks written for accounts payable were subject to the approval of Umphrey.

During the spring of 1995, Petitioner paid Umphrey $288 for a 24% stake in Lorac, but Umphrey never cashed the

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[1] This is borne out by the testimony of Cynthia Sauls Bolton, the supervisor of the payroll department, who testified that she was instructed that all direction was to come from Garner Umphrey and that she was to ignore any instructions coming from Petitioner.

check and Lorac never issued a stock certificate to Petitioner. Until November 1995, Umphrey was either the sole shareholder or controlling shareholder and, as such, exercised ultimate control over Lorac.

Petitioner did, during the time period at issue, sign two Form 941s (payroll tax returns) on behalf of Lorac. The first was for the third calendar quarter of 1995, and was signed at the behest of an agent of the Internal Revenue Service ("IRS"). The second was for the fourth calendar quarter of 1995, and was signed only after Lorac had filed for bankruptcy protection. These quarters are the last two quarters of the six consecutive quarters of payroll taxes at issue.

On August 28, 1995, Petitioner discovered that Umphrey had not been remitting Lorac's payroll taxes to the Government. Petitioner confronted a confidant of Umphrey who admitted that Lorac had failed to remit payroll taxes during the final two quarters of 1994 through August 1995.

Petitioner then confronted Umphrey about the unpaid taxes, but the discussions were unproductive, and Petitioner could not ascertain the amount of the tax liability. In spite of Umphrey's authority, Petitioner requested that the bookkeeping department immediately begin paying $30,000 per week to the IRS towards the liability. Soon, after only a few payments to the IRS had been made, Umphrey learned of the payments and ordered the bookkeeping department to cease making them. Umphrey thwarted the Petitioner's efforts to see that the payroll taxes were remitted to the Government.

In November 1995, during the last payroll tax quarter at issue, and just prior to Lorac's filing for bankruptcy, Umphrey appointed the Petitioner as acting President of Lorac as the company was failing and headed toward bankruptcy. This was apparently done in hopes that Petitioner might be able to bail Lorac out of its financial problems.

Shortly thereafter, Petitioner Thosteson had Lorac file for protection with the United States Bankruptcy Court. After the bankruptcy filing, Umphrey disappeared. It was subsequently discovered that Umphrey had stolen some of the withheld payroll taxes and absconded. Although the Government sued Umphrey in absentia for the withheld payroll taxes, his whereabouts remain unknown.

Peter Thosteson, Petitioner, did not steal and did not run. He voluntarily remained as president of Lorac and submitted Lorac to the jurisdiction of the United States Bankruptcy Court.

On December 29, 1995, the bankruptcy court entered an order enjoining the IRS from contact with Lorac's clients. As a part of the order, Lorac, with Petitioner as president, began paying $10,000 weekly to the IRS in an attempt to satisfy the back payroll taxes. In a subsequent proceeding, the bankruptcy court entered an order setting aside the injunction on or about August 6, 1996. On the advice of counsel, Petitioner Thosteson converted Lorac to Chapter 7 bankruptcy status, the company ceased doing business, and the payments to the IRS stopped. Prior to and during the bankruptcy, Petitioner Thosteson divided the dwindling and inadequate resources of the bankrupt company among various creditors and others. Thosteson paid employees, utilities, and made one small payment to a joint venture that he and his wife had with Lorac, most of which payments were subject to the bankruptcy court's imposition of a payment plan for Lorac's creditors.

Instead of seeking the readily available bankruptcy remedies against Lorac and instead of pursuing Umphrey, the Government assessed a payroll tax penalty of over $1 million against Petitioner Thosteson personally. On July 11, 1997, pursuant to section 6672 of the Internal Revenue Code of 1986, as amended (the "Code"), a delegate of the Secretary of the Treasury (the "Secretary") made an assessment against the Petitioner for the "trust fund" portion of the payroll taxes (*i.e.*, the Form 941 taxes), said taxes being attributable to the final two calendar quarters of 1994 and all four

quarters of 1995. The amount of the penalty sought by the Secretary was $1,293,427.09.

The Petitioner filed an action against the United States seeking a refund of his partial payment of the tax penalty assessment. A jury trial was held in the United States District Court for the Middle District of Alabama, and the jury returned a verdict in Petitioner's favor for all of the quarters at issue. The jury found that Thosteson was not a responsible party for the last two quarters of 1994 and the first two quarters of 1995 (*i.e.*, before he discovered that Umphrey had not paid the payroll taxes to the Government) and found that Thosteson's lack of payment for the last two quarters of 1995 was not willful.

Pursuant to Rule 50 of the Federal Rules of Civil Procedure, the district court granted judgment as a matter of law for the Defendant United States of America, holding that the two elements required by section 6672 (*i.e.*, "willful" conduct and "responsible person" status) had been met by the Petitioner for all six calendar quarters at issue. In making this decision, the district court failed to address the issue of whether the phrase "willful" as used in the statute was limited by "reasonable cause."

The Petitioner appealed to the Eleventh Circuit Court of Appeals, which affirmed the district court's order and subsequently denied a petition for rehearing en banc. Among other things, the Court of Appeals held that Thosteson's payment of creditors other than the IRS, after having knowledge of the payroll tax delinquency, rendered him retroactively liable for all previously unpaid payroll taxes. The Court of Appeals noted that whether or not a defense of "reasonable cause" can avoid a finding of willfulness had not been addressed by the Eleventh Circuit, and rejected Petitioner's argument to apply that defense in this case. *Thosteson v. United States*, 331 F.3d 1294, 1301 (11th Cir. 2003).

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS WARRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL AS TO WHETHER THE PAYROLL TAX PENALTY OF 26 U.S.C. § 6672, WHICH REQUIRES A WILLFUL FAILURE TO REMIT PAYROLL TAXES, CONTAINS A REASONABLE CAUSE LIMITATION.

Section 6672 imposes a 100% payroll tax penalty on a responsible person who willfully fails to remit withheld payroll taxes on behalf of his employer to the Government. The courts have substantially lowered the threshold for imposing this often crushing penalty on individuals, even where an individual is not culpable under the plain meaning of the term "willful."

In the context of section 6672, the courts have held that no bad motive or evil intent is required. *Burden v. United States*, 486 F.2d 302, 304 (10th Cir. 1973), *cert. denied*, 416 U.S. 904 (1974). Rather, "willfulness" in the context of section 6672, has been interpreted to mean merely a "voluntary, conscious and intentional act." *Mazo v. United States*, 591 F.2d 1151, 1155 (5th Cir. 1979). A responsible person acts willfully if he simply acts with knowledge of non-payment or shows a "reckless disregard of a known or obvious risk that trust funds may not be remitted to the government such as by failing to investigate or to correct mismanagement after being notified that withholding taxes have not been duly remitted." *Id.* at 1154 (citation omitted).

Moreover, many courts, including the Eleventh Circuit Court of Appeals, have determined that certain factual paradigms establish willfulness as a matter of law even when the facts do not involve personal fault or an intentional failure to remit withholding taxes to the United States. One of these paradigms is the payment of other bills, no matter how

insignificant, with any knowledge that payroll taxes have not been paid at any time in the past. *See Williams v. United States*, 931 F.2d 805 (11th Cir. 1991). "These paradigms obviously create an expansive web of liability 'as a matter of law' and significantly ease the government's burden under Fed. R. Civ. P. 50(b)." *Finley v. United States*, 123 F.3d 1342 (10th Cir. 1997). This "strict liability" approach to the willful element of section 6672 has not gone unnoticed, or uncriticized, by the commentators or the courts.[2]

In 1997, in response to this draconian power of the Internal Revenue Service ("IRS"), and in sharp contrast to the Eleventh Circuit Court of Appeals, the Tenth Circuit Court of Appeals expressly adopted and defined a reasonable cause limitation to liability under section 6672 in *Finley*, 123 F.3d 1342. In doing so, the Tenth Circuit stated that it was:

> troubled by the possibility [that] courts have transformed 26 U.S.C. § 6672 into a *strict liability statute*, outside the jury's realm, by (1) broadly defining the most likely fact scenarios leading to a failure to pay withholding taxes as "willful" conduct as a matter of law, and (2) closing the door on any opportunity for a responsible person to distinguish his case from those factual scenarios, or paradigms (*i.e.*, demonstrate reasonable cause for failure to pay). As "'[m]aintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence, it is our duty to

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[2] *See* Corrie Lynn Lyle, *Note: The Wrath of I.R.C. § 6672; The Renewed Call for Change—Is Anyone Listening? If You Are a Corporate Official, You Had Better Be*, 74 S. Cal. L. Rev. 1133 (May 2001) (stating that the reorganization of Section 6672 from the other criminal provisions of the Code in 1954 has caused the term willful to have lost its original meaning, and that some courts almost interpret it as a strict liability provision, and calling for more judicial scrutiny in interpreting the statute). *Fowler v. United States*, 820 F. Supp. 1390, 1395 n.2 (D. Wyo. 1993) ("Section 6672 is not a strict liability statute, although after reviewing the case law, one might believe otherwise.").

> carefully scrutinize any apparent curtailment of that function.'" *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 501 (1959) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).

Finley, 123 F.3d at 1346-47 (emphasis addedd).

The Tenth Circuit, in an effort to both protect the Government's revenue and to preserve a role for the jury without undermining existing precedent, expressly recognized a "reasonable cause" limitation on the use of factual paradigms to define willfulness. *Finley*, 123 F.3d at 1348. In this way, the courts could continue to maintain pressure on responsible persons to pay taxes, but at the same time provide those responsible persons with a way to demonstrate that there was reasonable cause for the failure to pay. *Id.* The court delineated the circumstances when the reasonable cause limitation would apply as: (1) where the taxpayer has made reasonable efforts to protect the trust funds, and (2) those efforts have been frustrated by circumstances outside the taxpayer's control. *Id.* The court felt that this approach would preserve the role of the jury to determine based on all relevant evidence whether a taxpayer's conduct was motivated by the "requisite scienter." *Id.*

The Eleventh Circuit has refused to adopt the reasonable cause limitation on the broad definition of willfulness.[3] Instead, as in this case, the Eleventh Circuit has continued to seize upon certain factual paradigms to define willfulness as a matter of law. For instance, "the willfulness requirement . . . is satisfied if the responsible person has knowledge of payments to other creditors after he becomes aware of the failure to remit the withheld taxes." *Thosteson v. United*

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[3] "This Circuit has not yet addressed whether a defense of 'reasonable cause' can avoid a finding of willfulness in this context. We decline, however, to address this issue today." *Thosteson v. United States*, 331 F.3d 1294, 1301 (11th Cir. 2003).

States, 331 F.3d 1294, 1300 (2003) (citing *Williams*, 931 F.2d at 810; *Smith v. United States*, 894 F.2d 1549, 1553 (11th Cir. 1990); and *Thibodeau v. United States*, 828 F.2d 1499, 1505 (11th Cir.1987)).

The Fifth Circuit Court of Appeals has recognized conceptually that the concept of reasonable cause might exist, but has apparently never found a set of facts where it deemed that an individual had shown a reasonable cause. *See Logal v. United States*, 195 F.3d 229 (5th Cir. 1999) ("In *Bowen v. United States*., 836 F.2d 965, 968 (5th Cir. 1988), we stated that 'although we have recognized conceptually that a reasonable cause may militate against a finding of willfulness, no taxpayer has yet carried that pail up the hill.'").

The First, Ninth, and Seventh Circuit Courts of Appeal have expressly rejected the possibility that circumstances beyond a person's control might render his conduct less than willful. *See, e.g., Harrington v. United States*, 504 F.2d 1306, 1316 (1st Cir. 1974); *Pacific National Insurance Co. v. United States*, 422 F.2d 26, 33 & n. 19 (9th Cir.), *cert. denied*, 398 U.S. 937 (1970); *Monday v. United States*, 421 F.2d 1210, 1216 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970).

The Second Circuit Court of Appeals, while holding that reasonable cause can bar liability under section 6672, has defined reasonable cause in an entirely different manner than the Tenth Circuit. Under the Second Circuit's definition, a responsible person's "failure to cause the withholding taxes to be paid is not willful if he [or she] believed that the taxes were in fact being paid, so long as that belief was, in the circumstances, a reasonable one." *Winter v. United States*, 196 F.3d 339, 345 (2nd Cir. 1999) (internal quotation omitted).

The Petitioner contends that the Eleventh Circuit Court of Appeals, and the other circuits that have rejected the reasonable cause limitation on the definition of willfulness

are incorrect. The word "willfully," no matter the context, "still denotes a conscious motion of the will." *Finley*, 123 F.3d at 1347 (citing BLACK'S LAW DICTIONARY 1434 (5th ed. 1979)). The inquiry is thus "necessarily directed to the state of the responsible person's mind," and is properly an issue of "scienter"—"the quintessential jury issue." *Finley*, 123 F.3d at 1347 (quoting *Thibodeau*, 828 F.2d at 1505; and *Turpin v. United States*, 970 F. 2d 1344, 1350 (4th Cir. 1992)). Those courts who have continued to seize upon certain factual paradigms to define willfulness as a matter of law are "depriving the word 'willfully' of its operative effect." *Finley*, 123 F.3d at 1347.

The Petitioner further contends that had the Eleventh Circuit Court of Appeals seized the opportunity to limit the expansive definition of willfulness, the conduct of the Petitioner would have met any reasonable definition thereof, and would almost certainly have met the standard of reasonable cause pronounced by the *Finley* court. Upon Petitioner's learning of the delinquent taxes, he immediately confronted the company's controlling shareholder, Garner Umphrey, and then asked the company's bookkeeping department to begin making $30,000 weekly payments to the IRS even though he did not know the amount of past due payroll taxes. This was a "reasonable effort to protect the trust funds," the first element of the Tenth Circuit's reasonable cause exception to section 6672 liability. *See Finley*, 123 F.3d at 1348. At trial, the Petitioner also showed that the $30,000 payments were stopped on the command of Umphrey, the controlling shareholder. Thus, Petitioner's "efforts [were] frustrated by circumstances outside the [Petitioner's] control," meeting the second element of the Tenth Circuit's reasonable cause limitation. *Id.* Moreover, Petitioner made additional payments to the IRS once Lorac had filed for bankruptcy protection.

II. CERTIORARI IS WARRANTED BECAUSE THE ELEVENTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW REGARDING THE PAYROLL TAX PENALTY THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The word "willfully" in a penal statute should require something more than carelessness. This Court has previously recognized the national importance of the Government's enforcement of a penal statute that required willful acts and granted certiorari to interpret the word "willful" to require specific knowledge of unlawfulness.

In *Ratzlaf v. United Sates*, 510 U.S. 135 (1994), this Court interpreted willfulness in a statute that penalized the structuring of deposits to avoid the reporting requirement for bank deposits of $10,000 or more. This Court rejected a watered down version of willfulness used by the court of appeals and championed by the Government, and held that when Congress structures a statute with a "willfulness" requirement, it does so intentionally, and if it intends to create a strict liability statute, it may do so by design. *Id.* at 146. This Court held that "to convict Ratzlaf of the crime with which he was charged . . ., the jury had to find he knew the structuring in which he was engaged was unlawful." *Id.* at 149.

Similarly, section 6672 was originally a criminal statute. *See Lyle*, *supra*, note 2. Even after its movement to the civil portion of the Code, it retains its penal nature.

By interpreting the term willfulness in section 6672 to exclude circumstances for which an employee has reasonable cause for failing to remit payroll taxes, this Court could again restore the plain meaning of the intent requirement in a penal statute. The Government should have to show that an employee acted with intent to violate his personal duty to pay

over payroll taxes. By requiring culpability, the statute would focus on those employees who steal or refuse to pay when their company has the resources to do so, but will not penalize an employee who makes a good faith effort to pay, but whose efforts are thwarted by circumstances beyond his control.

CONCLUSION

The interpretation of willfulness to mean what it says will have a broad nationwide impact. The Government's egregious imposition of the hammer of personal liability under section 6672 is not isolated to the Petitioner, but is often used on the employees of small businesses, many of whom cannot afford to litigate the assessment of the penalty. *See generally Lyle*, *supra*, note 2, *passim* (collecting cases).

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

No. 01-14520.

PETER THOSTESON,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

June 2, 2003.

Appeal from the United States District Court for the Middle District of Alabama.

Before EDMONDSON, Chief Judge, and CARNES and SILER* Circuit Judges.

SILER, Circuit Judge:

Subsequent to the publication by the previous panel opinion dated September 11, 2002, published at 304 F.3d 1312 (11th Cir.2002), the United States moved the court to amend the opinion to delete Section III.A., entitled "Allocation of the Burden of Proof." Good cause having been shown, the original panel has granted the motion, withdraws the previous panel opinion of September 11, 2002, and substitutes therefor the following opinion.

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* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

Plaintiff Peter Thosteson filed this action against the United States seeking a refund of his partial payment of the tax penalty assessment made against him pursuant to 26 U.S.C. § 6672, based on the failure of the company for which he worked to submit payroll withholding trust fund taxes (the "taxes"). A trial was held, and the jury returned a verdict in his favor for all tax quarters at issue. Pursuant to Rule 50 of the Federal Rules of Civil Procedure, the district court granted judgment as a matter of law for the Defendant United States of America (the "government"), finding Thosteson liable for all tax quarters at issue. Thosteson appeals that decision. We affirm.

I.

In response to an Internal Revenue Service (IRS) assessment, Thosteson filed this action against the government. He seeks a refund of his partial payment of the taxes from the third quarter of 1994 through all four quarters of 1995 (until November 28, 1995), which his employer, Lorac, Inc., failed to remit to the government. The judgment amounts to $1,293,427.09.[1]

Prior to submission of the case to the jury, the government made a motion for judgment as a matter of law. The court reserved decision on that motion. After the jury began deliberations, it returned with a question: "If the jury were to find that plaintiff was a responsible person for only following quarters, third quarter of 1995, fourth quarter of 1995, but was not willful in the failure to pay taxes of said quarters, will Mr. Thosteson be assigned a penalty?" The court answered that an individual must be both "responsible" and "willful" to be liable for the penalty. Subsequently, the jury returned a verdict in favor of the taxpayer. For the last two quarters of

[1] Judgment was actually entered for $1,560,235.45, which includes interest from the date of the assessment. Plaintiff did not contest this figure below, nor does he contest it in this appeal.

1994 and the first two quarters of 1995, the jury found that Thosteson was not a responsible party. For the third and fourth quarters of 1995, the jury found that Thosteson was a responsible party, but his conduct in not paying the taxes was not willful.

The government renewed its request for a judgment as a matter of law. The court granted that motion, overturning the jury verdict and entering judgment for the government.

The district court recounted the following basic facts in its opinion granting the Rule 50 motion:

> Plaintiff was an incorporator of Lorac, Inc., an employee leasing business. Initially he was one of the company's vice-presidents, and his main responsibility was sales and "growing" the business. He had limited authority to hire and fire employees, to determine financial policy, to set salaries and wages, to pay employees, and to enter loan agreements on Lorac's behalf. He opened bank accounts for Lorac with People's Bank in Dothan, Alabama, and was a signatory on those accounts with the ability to write checks under his sole signature for amounts up to $750. Lorac had two different kinds of checks: Checks that expressly required two signatures for amounts above $750, and checks that did not. On at least three occasions, Plaintiff wrote checks for more than $750 under his sole signature on Lorac checks that did not expressly require two signatures [checks in the amount of $1,000, $923.04 and $45,000]. The evidence at trial did not show that those checks were not honored, and conclusively proved that at least one such check was honored [entered into evidence along with the bank statement indicating that the check was cashed and honored]. Further, Plaintiff also had the authority to sign Lorac's Form 941 withholding tax returns, and he did so for the third and fourth quarters of 1995.
>
> In the spring of 1995, Plaintiff purchased a 24% stake in Lorac from its sole shareholder, Garner Umphrey, for

> $288. Umphrey, however, did not cash the check that Plaintiff used to pay him. At some point before the bankruptcy, Plaintiff also became the president of Lorac.
>
> Plaintiff testified at trial that he knew during the entire period at issue in this suit that a responsible person has a duty under the law to assure that withholding taxes are remitted to the United States. And he testified that as of August 28, 1995[,] he was aware that Lorac had failed to remit withholding taxes to the United States, and that, in October 1995, he became aware of the full amount of withholding taxes that Lorac owed.
>
> The undisputed evidence showed that after Plaintiff became aware that Lorac owed withholding taxes to the government and after he became aware of the full amount of the taxes that were owed, he continued to write check after check to other creditors under his signature alone, including checks to Tack and So Forth, Inc. (a joint venture of Lorac and Plaintiff's wife) [for $1,000, dated October 18, 2001], himself [for $280, dated October 20, 1995], Builder's Cash and Carry [for $923, dated October 13, 1995], and Garner Insurance Agency [for $45,000, dated October 13, 2001].

Thosteson v. United States, 182 F.Supp.2d 1189, 1191-92 (M.D.Ala.2001) (notes omitted).

On appeal, Thosteson emphasizes the role of Garner Umphrey, who has also been sued by the government but has disappeared. He describes their relationship as beginning in the late 1980's through Umphrey's uncle, who at tended Thosteson's church. In 1993, Umphrey approached Thosteson about starting an employee leasing business in the civilian context. Umphrey was already involved in employee leasing on behalf of military contractors. Thosteson claims that he originally had no related experience or background, but he educated himself in the computer program area of the business and proceeded to build the company through sales and marketing. He credits his sales and marketing efforts in

late 1994 and early 1995 for making the new business become very successful. During 1995, the company had between four thousand and five thousand employees.

Nevertheless, Thosteson claims that Umphrey was not only the sole stockholder up through April 1995, but he and his wife also controlled all major decisions within the business. He alleges that Umphrey started diverting money from the company into his other business enterprises, and these alleged transfers amounted to hundreds of thousands of dollars.

Regarding the taxes, Thosteson claims that he was not aware of the corporation's failure to pay them until August 28, 1995. He alleges that he was hospitalized when he found out that the taxes had not been paid. Further, after finding out about the tax arrears in August 1995, even though not knowing the amounts of those arrearages, he used his best efforts to try to establish a repayment plan. Thosteson testified that on August 28, 1995, he confronted Umphrey's wife and confirmed with her that the company had substantial overdue payroll tax liabilities. Thereafter, he arranged for Lorac to make weekly payments of $30,000 to the IRS. Thosteson and Umphrey's wife signed three checks for $30,000 on an account of the company, payable to the IRS, and dated August 31, September 6 and September 15, 1995. He alleges that his efforts were frustrated by Umphrey who contradicted his orders and stopped the tax restitution payments. Thosteson does not deny, however, that he knew Umphrey ordered the payments to cease. He claims that he continued to use his best efforts to make the business successful because based on his meeting with Lorac's bookkeeper, he felt that if they continued with the business, then the taxes could be successfully repaid. Thosteson signed the payroll tax return for the third and fourth quarters of 1995.

He testified that in November 1995, he became the president of Lorac through Umphrey's consent and in order to formulate a Chapter 11 bankruptcy plan to repay the taxes

and keep the business going. The company's original petition for reorganization eventually converted to a Chapter 7 liquidation case, and the company went out of business in 1997.

The principal service offered by Lorac to its clients, in addition to volume discounts for workers compensation insurance, was relief from the paperwork of handling payroll, including the filing of federal employment tax returns and the payment of those taxes. The client's employees became employees of Lorac for purposes of payroll processing and payroll taxes.

II.

We review *de novo* a district court's grant of judgment as a matter of law under Rule 50, applying the same standards as the district court. *Slicker v. Jackson,* 215 F.3d 1225, 1229 (11th Cir.2000). We consider whether such sufficient conflicts exist in the evidence to necessitate submitting the matter to the jury or whether the evidence is so weighted in favor of one side that one party must prevail as a matter of law. *Mendoza v. Borden, Inc.,* 195 F.3d 1238, 1244 (11th Cir.1999) (*en banc*). Although we look at the evidence in the light most favorable to the non-moving party, the non-movant must put forth more than a mere scintilla of evidence suggesting that "reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions." *Id.* (quoting *Walker v. NationsBank of Florida, N.A.,* 53 F.3d 1548, 1555 (11th Cir.1995)).

III.

Section 6672 imposes liability upon (1) a responsible person (2) who has willfully failed to perform a duty to collect, account for, or pay over federal employment taxes.[2]

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[2] Section 6672 provides:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title [Title 26 of the United States Code]

See Williams v. United States, 931 F.2d 805, 810, *reh'g granted and opinion supplemented,* 939 F.2d 915 (11th Cir.1991).

A. "Responsible" Person

A person is responsible within the meaning of § 6672 if he has a duty to collect, account for, or pay over taxes withheld from the wages of a company's employees. *Thibodeau v. United States,* 828 F.2d 1499, 1503 (11th Cir.1987). Responsibility is a matter of status, duty and authority, not knowledge. *Mazo v. United States,* 591 F.2d 1151, 1156 (5th Cir.1979).[3] Section 6672 responsibility is a matter of the power and authority to make payment of withholding taxes, which is not dispositively determined by corporate title or position. *Neckles v. United States,* 579 F.2d 938, 940 (5th Cir.1978). "Indicia of responsibility include the holding of corporate office, control over financial affairs, the authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees." *George v. United States,* 819 F.2d 1008, 1011 (11th Cir.1987).

In the case at bar, the government has met its burden by presenting overwhelming evidence as to all of the mentioned indicia of responsibility. Thosteson vehemently argues that Umphrey was the responsible person. However, a company may have more than one responsible person within the

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> who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

26 U.S.C. § 6672(a).

[3] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), we adopted as binding precedent the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

meaning of § 6672. *Thibodeau*, 828 F.2d at 1503. Because Umphrey was responsible does not absolve Thosteson of responsibility. Thosteson helped incorporate Lorac, served as vice-president and president, owned varying levels of stock in Lorac from 24% to 100%, and possessed the authority to hire and fire. It is logical that a vice-president who was also a significant shareholder would be a responsible person under the statute.

Furthermore, the government's point that Thosteson admits to being in charge of marketing is well taken. The principal benefit to this employee leasing arrangement, which Lorac's marketing materials stressed, is the tax and administrative savings, and much of the administrative savings has to do with tax-related payroll deductions and withholdings.

Thosteson's principal argument as to the limits of his authority and "responsibility" under § 6672 relates to his claim that he had limited check writing authority, up to only $750, without a countersignature of Umphrey or his wife. In dispensing with this same argument, the Fifth Circuit observed: "[Plaintiff] also argues that he did not have the actual authority to pay the entire tax bill because his check writing authority was limited to relatively small amounts .... [but][t]he Internal Revenue Service would certainly not have objected to payment of the tax deficiency by several small checks." *Gustin v. I.R.S.*, 876 F.2d 485, 492 (5th Cir.1989). We agree. Thus, even presuming the limitations on his authority imposed by Umphrey and ignoring the overwhelming evidence presented by the government to the contrary, this would not remove his "responsibility" under § 6672. Therefore, the finding that Thosteson was a "responsible" person as a matter of law was not erroneous. The government has more than met its burden here.

B. Willful Failure

Turning to the requirement of willfulness, this court has held that the willfulness requirement of § 6672 is satisfied if the responsible person has knowledge of payments to other creditors after he becomes aware of the failure to remit the withheld taxes. *Williams*, 931 F.2d at 810 (citing *Smith v. United States*, 894 F.2d 1549, 1553 (11th Cir.1990) and *Thibodeau*, 828 F.2d at 1505). Willfulness, however, "does not require a fraudulent or other bad motive on the part of the responsible person." *Id.* (citing *Hewitt v. United States*, 377 F.2d 921, 924 (5th Cir.1967)).

Thosteson admits that he became aware of the trust fund arrearages on August 28, 1995. He claims, however, that Umphrey ordered the suspension of the $30,000 weekly repayment schedule. Nevertheless, the "Nuremburg defense," as some courts have referred to it, is not available to Thosteson. *See Brounstein v. United States*, 979 F.2d 952, 956 n. 5 (3d Cir.1992) (discussing and dismissing "Nuremburg defense," holding it is no defense that taxpayer "served only as a nominal president whose signature constituted a mere 'rubber stamp' for [principal shareholder-director's] decisions" and "instructions from a superior not to pay taxes do not . . . take a person otherwise responsible . . . out of that category"); *Roth v. United States*, 779 F.2d 1567 (11th Cir.1986) (holding vice president and minority shareholder who handled day-to-day operations and wrote corporate checks was a responsible person even though the president had instructed him not to pay the government).[4] Thosteson

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[4] *See also Gephart v. United States*, 818 F.2d 469 (6th Cir.1987) (holding nonshareholder general manager was a responsible person, notwithstanding testimony that major shareholder had told him it was none of his business that withheld taxes were not being paid); *Howard v. United States*, 711 F.2d 729 (5th Cir.1983) (holding director and treasurer of corporation, who had signatory authority over main corporate checking account, was a responsible person even though chief executive officer

knew that the taxes were owed and that they were not being paid under Umphrey's order. Acting, or rather failing to act, under orders from his superior does not negate his culpability under the statute.

Thosteson admits that he became the undisputed president of the company, with concomitant authority, at the beginning of November, prior to the filing of bankruptcy. He was aware of the arrearages, and after he became aware of this deficiency, he still issued 262 checks to various creditors and others, including himself and his wife's company. Even if a "responsible" person is unaware that withholding taxes have gone unpaid in past quarters, a responsible person who becomes aware that taxes have gone unpaid in past quarters in which he was also a responsible person, is under a duty to use all "unencumbered funds" available to the corporation to pay those back taxes. *Mazo,* 591 F.2d at 1157; *see also United States v. Kim,* 111 F.3d 1351, 1357 (7th Cir.1997) (same); *Honey v. United States,* 963 F.2d 1083, 1089 (8th Cir.1992) (same). This duty extends not only to funds available to the corporation at the time the responsible person becomes aware but also to any unencumbered funds acquired thereafter. If the responsible person fails to use such unencumbered funds to satisfy the past unpaid liability, he is deemed personally liable for the taxes that went unpaid in the past while he was responsible. The responsible person deemed liable for the unpaid liability of past tax quarters is considered to have

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upon hearing of payment to IRS had ordered plaintiff not to pay IRS any more money and subsequently suspended him for several weeks; after resigning in part based on company's failure to remit the taxes, plaintiff notified IRS of corporation's unpaid taxes, but though corporation then had substantial assets, when IRS sought to collect taxes more than two years later, it had none); *Greenberg v. United States,* 46 F.3d 239 (3d Cir.1994) (holding controller was a responsible person even though the chief executive officer ordered him not to pay trust fund taxes, and he believed that if he issued a check for the taxes, it would bounce and he would be fired).

"willfully" failed to pay over the taxes for those past quarters, even though he was unaware at that time that the taxes were going unpaid. *Mazo*, 591 F.2d at 1157. Even giving Thosteson the benefit of the doubt, that he was merely paying other creditors in order to keep the company going and preserve its ability to repay the tax debt, he is still liable under the law of this Circuit.

C. Reasonable Cause

Finally, Thosteson raises the putative defense of "reasonable cause." *See, e.g., Finley v. United States*, 123 F.3d 1342 (10th Cir.1997) (reasonable cause sufficient to excuse a responsible person's failure to pay withholding taxes occurs in circumstances where (1) the taxpayer has made reasonable efforts to protect the trust funds, but (2) those efforts have been frustrated by circumstances outside the taxpayer's control). This Circuit has not yet addressed whether a defense of "reasonable cause" can avoid a finding of willfulness in this context. We decline, however, to address this issue today. Such defense as applied by other circuits would still not be applicable under the facts of this case for the same reasons set forth by the Fifth Circuit in addressing a similar situation:

We have consistently held that the reasonable cause defense to a § 6672 action is exceedingly limited. In *Bowen v. U.S.*, 836 F.2d 965, 968 (5th Cir.1988), we stated that "[a]lthough we have recognized conceptually that a reasonable cause may militate against a finding of willfulness, no taxpayer has yet carried that pail up the hill." *See also Newsome v. U.S.*, 431 F.2d 742, 747 (5th Cir.1970). No such defense may be asserted by a responsible person who knew that the withholding taxes were due, but who made a conscious decision to use corporate funds to pay creditors other than the government. *Newsome*, 431 F.2d at 747 n. 11; *Frazier v. U.S.*, 304 F.2d 528, 530 (5th Cir.1962).

Here, [plaintiff] consciously decided to make payments to creditors other than the government even though he knew that the withholding taxes had not been paid. The facts [plaintiff] relied on were not sufficient to support a reasonable cause defense.

Logal v. United States, 195 F.3d 229, 233 (5th Cir.1999); *cf. Finley,* 123 F.3d at 1342 (finding potential "reasonable cause" where as soon as individual determined that taxes were owed, ordered subordinate to pay the taxes without reason to doubt that subordinate would do so, and subordinate did not pay the taxes; when the failure was discovered, no unencumbered funds were available to pay the liability).

IV.

We do not quarrel with Thosteson's contention that Umphrey is the more culpable party, but even so conceding, being less culpable does not exonerate Thosteson from his responsibility, which he knowingly disregarded. As we have observed, "[t]he seeds of common sense compassion sown by the jury find scant hospitality on this rock hard legal landscape." *Williams,* 931 F.2d at 811. The district court did not err in setting aside of the jury's verdict and granting judgment as a matter of law to the government.[5]

AFFIRMED.

331 F.3d 1294, 91 A.F.T.R.2d 2003-2468, 16 Fla. L. Weekly Fed. C 684.

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[5] Thosteson's assignment of error relating to the court's response to the jury's question is mooted by our finding that judgment as a matter of law was not in error. Likewise, there is no merit to his claim that the grant of the judgment as a matter of law denied him his right to a jury trial.

APPENDIX B

UNITED STATES DISTRICT COURT
M.D. ALABAMA
SOUTHERN DIVISION

No. CIV.A.00-T-622-S
Aug. 7, 2001.

PETER THOSTESON,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION

MYRON H. THOMPSON, *District Judge.*

Plaintiff Peter Thosteson filed this action against defendant United States, seeking a refund of his partial payment of a penalty assessment made against him pursuant to 26 U.S.C.A § 6672 for withholding taxes from the third quarter of 1994 through November 28, 1995, that his employer, Lorac, Inc., did not remit to the government. A trial was held on August 1 and 2, 2001, and after the close of evidence and argument, the jury returned a verdict in favor of Thosteson for all the quarters at issue.

This cause is now before the court on the oral motion by the government for judgment as a matter of law pursuant to *Rule 50 of the Federal Rules of Civil Procedure*. For the reasons below, this motion will be granted.

I. LEGAL STANDARD

Rule 50 permits a court to enter judgment as a matter of law if, after an adequate hearing, there is no legally sufficient

evidentiary basis for a jury's verdict. *See* Fed.R.Civ.P. 50. When ruling on a motion for judgment as a matter of law, the court must consider all of the evidence in the light most favorable to the party opposed to the motion. *See, e.g., Williams v. United States*, 931 F.2d 805, 809 (11th Cir.1991); *Smith v. United States*, 894 F.2d 1549, 1552 (11th Cir.1990); *Thibodeau v. United States*, 828 F.2d 1499, 1503 (11th Cir.1987). A motion for judgment as a matter of law should be granted only if, viewing the evidence as a whole and drawing all reasonable inferences in favor of the nonmoving party, no reasonable jury could reach a contrary verdict. *See Williams*, 931 F.2d at 809.

II. FACTS

Thosteson was an incorporator of Lorac, Inc., an employee leasing business. Initially he was one of the company's vice-presidents, and his main responsibility was sales and "growing" the business. He had limited authority to hire and fire employees, to determine financial policy, to set salaries and wages, to pay employees, and to enter loan agreements on Lorac's behalf. He opened bank accounts for Lorac with People's Bank in Dothan, Alabama, and was a signatory on those accounts with the ability to write checks under his sole signature for amounts up to $750. Lorac had two different kinds of checks: Checks that expressly required two signatures for amounts above $750, and checks that did not. On at least three occasions, Thosteson wrote checks for more than $ 750 under his sole signature on Lorac checks that did not expressly require two signatures.[1] The evidence at trial did not show that those checks were not honored, and conclusively proved that at least one such check was

[1] *See* Government's Exhibits 408 (check for $ 1,000), 382 (check for $ 923.04), and 383 (check for $ 45,000).

honored.[2] Further, Thosteson also had the authority to sign Lorac's Form 941 withholding tax returns, and he did so for the third and fourth quarters of 1995.

In the spring of 1995, Thosteson purchased a 24 % stake in Lorac from its sole shareholder, Garner Umphrey, for $288. Umphrey, however, did not cash the check that Thosteson used to pay him. At some point before the bankruptcy, Thosteson also became the president of Lorac.

Thosteson testified at trial that he knew during the entire period at issue in this suit that a responsible person has a duty under the law to assure that withholding taxes are remitted to the United States. And he testified that as of August 28, 1995 he was aware that Lorac had failed to remit withholding taxes to the United States, and that, in October 1995, he became aware of the full amount of withholding taxes that Lorac owed.

The undisputed evidence showed that after Thosteson became aware that Lorac owed withholding taxes to the government and after he became aware of the full amount of the taxes that were owed, he continued to write check after check to other creditors under his signature alone, including checks to Tack and So Forth, Inc. (a joint venture of Lorac and Thosteson's wife),[3] himself,[4] Builder's Cash and Carry,[5] and Garner Insurance Agency.[6]

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[2] *See* Government's exhibit 408, along with the bank statement entered in evidence indicating that the check was cashed and honored.

[3] *See* Government's exhibit 408 (check for $1,000, dated October 18, 2001).

[4] *See* Government's exhibit 397 (check for $280, dated October 20, 1995).

[5] *See* Government's exhibit 382 (check for $923, dated October 13, 1995).

[6] *See* Government's exhibit 383 (check for $45,000, dated October 13, 2001).

II. DISCUSSION

Section 6672 imposes liability upon (1) a responsible person (2) who has willfully failed to perform a duty to collect, account for, or pay over federal employment taxes.[7] *See, e.g., Williams*, 931 F.2d at 810; *Thibodeau*, 828 F.2d at 1503; *George v. United States*, 819 F.2d 1008, 1011 (11th Cir.1987). The Eleventh Circuit agrees with the vast majority of other courts in holding that in tax refund cases, such as the case at bar, the burden of proof is on the plaintiff to show that the Internal Revenue Service's findings in assessing a deficiency are incorrect. *See, e.g., Trucks, Inc. v. United States*, 234 F.3d 1340, 1342 (11th Cir.2000). Specifically in the context of § 6672 cases, the Eleventh Circuit has held that it is the taxpayer's burden to establish that he or she was not willful in failing to pay over withholding taxes. *See, e.g., Malloy v. United States*, 17 F.3d 329, 331 (11th Cir.1994). However, the Court of Appeals has not directly decided who bears the burden of proof on the issue of whether a taxpayer is a responsible person in a refund suit for a § 6672 penalty. This court need not reach that issue here because both parties have agreed that the taxpayer in this suit bears the burden of showing that he was not a responsible person,[8] and, in any event, the allocation of the burden of proof does not bear on the court's findings, as discussed below, with regard to Thosteson's responsibility and willfulness.

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[7] *Section 6672* provides, in pertinent part, as follows:

> "Any person required to collect, truthfully account for, and pay over any tax imposed by this title [Title 26 of the United States Code] who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

[8] *See* Plaintiff's proposed jury instructions at 3.

A person is responsible within the meaning of § 6672 if he or she has a duty to collect, account for, or pay over taxes withheld from the wages of a company's employees. *See, e.g., Williams*, 931 F.2d at 810; *Thibodeau*, 828 F.2d at 1503; *George*, 819 F.2d at 1011. Responsibility is a matter of status, duty, and authority, not knowledge. *See Thibodeau*, 828 F.2d at 1503; *Mazo v. United States*, 591 F.2d 1151, 1156 (5th Cir.)[9], *cert. denied*, 444 U.S. 842, 100 S.Ct. 82, 62 L.Ed.2d 54 (1979). However, the law is clear that § 6672 responsibility is a matter of the power and authority to make payment of withholding taxes, and is not dispositively determined by corporate title or position. *See Neckles v. United States*, 579 F.2d 938, 940 (5th Cir.1978). "Indicia of responsibility include the holding of corporate office, control over financial affairs, the authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees." *George*, 819 F.2d at 1011.

The undisputed evidence in this case establishes beyond any doubt that Thosteson was a responsible person under § 6672: He had sufficient control over the financial affairs and day-to-day operations of Lorac, he had power to disburse corporate funds under his own name and authority, he held the position of a vice-president, he was a signatory on Lorac's bank accounts, and he set employee salaries, including his own. That other individuals may also have had these powers at Lorac is immaterial. The law is unambiguous that there may be more than one responsible person in a corporation, *see Williams*, 931 F.2d at 810 n. 7, and the fact that other persons involved with Lorac may have been responsible as well does not detract from the conclusion that Thosteson is a responsible person. This is most dramatically demonstrated

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[9] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

by these facts: He was a signatory on some bank accounts with the ability to write checks under his sole signature for amounts up to $750 on some occasions and the ability to write checks for more than $750 under his sole signature on others. Moreover, after Thosteson became aware that Lorac owed withholding taxes to the government and after he became aware of the full amount of the taxes that were owed, he continued to write check after check to other creditors under his signature alone.

The only changes in Thosteson's authority or position within Lorac during the period at issue in this suit were that he purchased, or attempted to purchase, a 24 % stake in Lorac from Garner Umphrey, and that at some time Thosteson became Lorac's president. However, neither of these changes altered the authority that Thosteson had—and exercised—to make payments to Lorac's creditors. And, as stated, corporate titles are not determinative of responsibility under § 6672. *See Neckles*, 579 F.2d at 940. And even if these changes altered Thosteson's authority, the evidence is undisputed that as of the end of the third quarter of 1995, Thosteson's authority was no less than he enjoyed since Lorac was incorporated, and, additionally, he was the company's president. Viewing all the evidence as a whole, and drawing all factual inferences in Thosteson's favor, no reasonable jury could have found that he was not a responsible person under § 6672.

The court now turns to the issue of Thosteson's willfulness. The term "willfulness" as used in criminal tax statutes is defined as the "voluntary, intentional violation of a known legal duty." *Cheek v. United States*, 498 U.S. 192, 200, 111 S.Ct. 604, 610, 112 L.Ed.2d 617 (1991). At a minimum, to satisfy the willfulness requirement of § 6672, a person must have some knowledge of failure or risk of failure to remit the employment taxes. *See Cooper v. United States*, 60 F.3d 1529, 1532 (11th Cir.1995); *Thibodeau v. United States*, 828

F.2d 1499, 1505-06 (11th Cir.1987). The Eleventh Circuit has held that the willfulness requirement of § 6672 is satisfied if the responsible person has knowledge of payments to other creditors after he becomes aware of the failure to remit the withheld taxes. *See Williams*, 931 F.2d at 810; *Smith*, 894 F.2d at 1553; *Thibodeau*, 828 F.2d at 1505. Willfulness, however, "does not require a fraudulent or other bad motive on the part of the responsible person." *Hewitt v. United States*, 377 F.2d 921, 924 (5th Cir.1967).

In this case, Thosteson testified that, as of August 28, 1995, he knew that Lorac was in arrears to the government on its withholding tax payments. He testified that, in October 1995, he knew the entire amount of the withholding taxes that Lorac owed, but had not paid, for all periods at issue in this suit. He also testified that he was aware of the duty of responsible persons to assure that withholding taxes be paid.

Despite this, during those times, he not only knew of payments to other creditors of Lorac, but he wrote and signed checks to make such payments: He wrote checks, under his sole name and authority, to—among others—his wife's company, Tack and So Forth, Inc., himself, Garner Insurance, and Builders Cash and Carry.[10] At least one check for more than $750 written under his name alone was honored by Lorac's bank. He also wrote check after check for amounts less than $750 to other creditors. Thosteson could have been writing those checks to the Internal Revenue Service instead.[11]

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[10] *See* Government's exhibits 382, 383, 397, and 408.

[11] Thosteson has disputed that he could have paid an amount over $ 750 to the government on his own authority. This is, however, not material. There is no requirement that payment to the government for withholding taxes be in one lump sum. Although it would have required writing many checks to cover Lorac's obligation, Thosteson himself, under his own undisputed authority could have done so. That he preferred not to, or that he may not have considered this solution, is not a defense.

Thosteson's preference for other creditors over the United States, given his knowledge both of Lorac's tax situation and his understanding of the duty of responsible persons to pay withholding taxes, establishes as a matter of law that Thosteson's failure to pay was willful. *See Williams*, 931 F.2d at 810; *Smith*, 894 F.2d at 1553; *Thibodeau*, 828 F.2d at 1505. No reasonable jury could have found otherwise.

IV. CONCLUSION

Considering the record as a whole and construing all inferences most favorably to Thosteson, any reasonable jury would have to find that he was a responsible person and that his failure to pay the amounts owed the government was willful. Accordingly, the motion by the United States for judgment as a matter of law will be granted.

182 F.Supp.2d 1189, 88 A.F.T.R.2d 2001-5564, 2001-2 USTC P 50,653, Unempl.Ins.Rep. (CCH) P 16615B

APPENDIX C

UNITED STATES DISTRICT COURT,
M.D. ALABAMA.

No. 00-T-622-S.

PETER THOSTESON,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Aug. 31, 2001.

ORDER

THOMPSON, J.

This cause is now before the court on the motion to modify judgment filed by defendant United States of America on August 13, 2001. The government requests, pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure, that the court modify the judgment entered August 7, 2001.

As grounds, the government argues that its posttrial oral motion was intended to request judgment in its favor both as to plaintiff Peter Thosteson's claims and as to the government's counterclaims, that the memorandum opinion entered on August 7, 2001, is consistent with this understanding of the motion, and that, as a matter of law, the government is entitled to judgment for the full outstanding amount of the 100% penalty assessed against Thosteson pursuant to 26 U.S.C.A. § 6672, that is, $1,560,235.45, a figure which Thosteson has not contested.

After consideration, the court agrees. The judgment that the court entered in this matter was intended to grant judgment in favor of the government both as to the claims of Thosteson and the counterclaim of the government. A review of the judgment itself reveals that this intent is not clearly conveyed by the language the court adopted.

B.

Furthermore, because the government filed a motion to modify judgment on August 13, 2001, which was after Thosteson filed his notice of appeal in this cause on August 9, 2001, the question is posed as to whether the court has jurisdiction to consider the modification motion. The answer is 'yes' for two reasons: First, the Eleventh Circuit Court of Appeals "has decided that a district court retains jurisdiction to consider and deny a Rule 60(b) motion filed after the perfection of an appeal of the original decision." *Wilson v. Thompson,* 638 F.2d 801, 803 (11th Cir.1981); *see also* Fed.R.App.P. 4(a)(4) (advisory committee notes to 1993 amendments) ("The amendment provides that a notice of appeal filed before the disposition of a specified posttrial motion will become effective upon disposition of the motion. A notice filed *before the filing of one of the specified motions* or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals.") (emphasis added).

Second, Thosteson's appeal is arguably ineffectual because it was filed before the court entered a final order disposing of all claims, that is, the remaining claims against Quentin Garner Umphrey and Candice Chapman Umphrey, on August 17, 2001. Rule 54(b) of the Federal Rules of Civil Procedure provides:

> "Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented

> in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

At the time Thosteson filed his appeal, the court had "adjudicate[d] fewer than all the claims or the rights and liabilities of fewer than all the parties" "For an appeal to be perfected following a decision that falls within the ambit of Rule 54(b), the district court must make an express 'direction for the entry of judgment' and a 'determination that there is no just reason for delay,' '10 James Wm. Moore, *et al.*, Federal Practice and Procedure § 2660 at 137 (3d ed.1998), which, of course, was not done here.

Accordingly, it is ORDERED that the motion to modify judgment filed by defendant United States of America on August 13, 2001, is granted, that the judgment entered on August 7, 2001, is vacated, and that an amended judgment consistent with the memorandum opinion entered August 7, 2001, for the full outstanding amount of the penalty assessed against plaintiff Peter Thosteson, including credits and payments, will be entered.

2001 WL 1172416 (M.D.Ala.), 88 A.F.T.R.2d 2001-5859

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

01-14520-II

THOSTESON

v.

U.S.

July 9, 2003, Decided

OPINION:

Suggestion for Rehearing En Banc Denied.

Supreme Court, U.S.
FILED
DEC 8 - 2003
OFFICE OF THE CLERK

(2)

No. 03-546

In the Supreme Court of the United States

PETER THOSTESON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner willfully failed to pay over to the United States the trust fund taxes withheld by Lorac, Inc.

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In the Supreme Court of the United States

No. 03-546

PETER THOSTESON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 331 F.3d 1294. The opinion of the district court (Pet. App. 13a-20a) is reported at 182 F. Supp. 2d 1189. The order of the district court modifying its opinion (Pet. App. 21a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2003. The petition for rehearing was denied on July 9, 2003 (Pet. App. 24a). The petition for writ of certiorari was filed on October 6, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was one of the incorporators of Lorac, Inc., which engaged in an employee leasing business. Pet. App. 3a. Lorac entered into contracts with existing businesses under which it hired the employees of those businesses as employees of Lorac and then "leased" the services of those employees back to the clients. *Id.* at 6a. Under these "lease" agreements, Lorac agreed to undertake payroll services for its clients, including the filing of federal employment tax returns for withheld Federal Insurance Contributions Act (FICA) and employee income taxes and the payment of those taxes over to the government. *Ibid.* During 1995, Lorac had more than four thousand employees engaged in such "lease" transactions. *Id.* at 5a.

Petitioner initially worked as Lorac's vice president in charge of marketing. Pet. App. 3a, 8a. He also had joint authority with Garner Umphrey—who was then the company's president—to hire and fire employees, to pay suppliers, to determine financial policy, to set salaries and wages (including his own), to decide what to charge clients for payroll services, to choose insurance policies, to pay employees and to enter into loan agreements on Lorac's behalf. *Id.* at 3a, 8a, 17a-19a; Gov't C.A. Br. 6. Petitioner had sole check signing authority on three of Lorac's bank accounts. On other accounts, he had the authority to write checks for amounts up to $750 on his signature alone. Pet. App. 3a, 8a, 14a-15a; Gov't C.A. Br. 6-7. Petitioner had joint authority to write larger checks on these accounts with another co-signer. Pet. App. 14a-15a, 18a; Gov't C.A. Br. 7.

In the Spring of 1995, petitioner acquired a 24-percent share of the stock of Lorac from Garner Umphrey. For the third and fourth quarters of 1995, petitioner signed the federal withholding tax returns for Lorac as the "president" of the company. Pet. App. 3a-4a, 10a, 15a. In November, 1995, petitioner signed a bankruptcy petition for Lorac as its president. *Id.* at 5a-6a. The bankruptcy was eventually converted to a Chapter 7 liquidation proceeding, and Lorac ceased its business operations during 1997. *Id.* at 6a.

2. For the period that preceded the commencement of the bankruptcy case, Lorac owed the United States approximately $1.3 million in unpaid employment taxes —taxes that had been withheld from the wages of its employees during the third and fourth quarters of 1994 and all four quarters of 1995. Pet. App. 2a. When these amounts were not paid in the bankruptcy proceeding, the Internal Revenue Service made an assessment against petitioner and against Garner Umphrey under 26 U.S.C. 6672 in the amount of the unpaid trust-fund taxes, determining that they were both responsible persons of the corporation who had willfully failed to collect and pay over the employment taxes due the United States. Pet. App. 2a, 4a, 13a.[1] Petitioner paid a divisible portion of the assessment for each of the quarters assessed and filed claims for refund. *Id.* at 2a, 13a, 21a-22a. When the government denied the refund claims, petitioner filed this refund suit in federal district court. The government then filed a counterclaim for the unpaid remainder of the Section 6672 assessment. *Id.* at 13a, 21a-22a.

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[1] The court of appeals noted that Garner Umphrey "has also been sued by the government but has disappeared." Pet. App. 4a.

3. The district court held a jury trial. Pet. App. 13a, 22a. At the trial, petitioner testified that, throughout the entire period of his involvement with Lorac, he knew that employee withholding taxes are held in trust for the United States and that a responsible person has a duty to ensure that these withheld taxes are remitted to the government. *Id.* at 4a, 15a; Gov't C.A. Br. 9. He further testified that, from August 28, 1995, onward, he was aware that Lorac had substantial overdue payroll tax liabilities. Pet. App. 5a, 19a. Indeed, in August and September of 1995, petitioner co-signed three checks to the IRS for $30,000 each, in partial payment of these liabilities of Lorac. He was also aware, however, that Lorac had ceased making these payments and remained delinquent in its payroll tax obligations through September, October, and November, 1995. *Id.* at 2a, 5a.

Petitioner did not dispute at trial that, even though he knew that the payments to the IRS had ceased and that Lorac was still delinquent, he took no other steps to arrange for the payment of the trust-fund taxes. Pet. App. 5a. The undisputed evidence showed that, even after petitioner was fully aware of the trust-fund tax delinquencies of Lorac, he continued to write and to authorize numerous checks to other creditors—including checks payable to himself and to a business in which his wife was part owner. *Id.* at 4a, 10a, 15a, 18a-19a.

The jury rendered a verdict that petitioner was not liable for the assessment against him under 26 U.S.C. 6672. The district court, however, granted the government's timely motion for judgment as a matter of law under Fed. R. Civ. P. 50. Pet. App. 13a-20a.

4. The court of appeals affirmed. Pet. App. 1a-12a. Based on the undisputed facts of record, the court held that the government had presented "overwhelming

evidence" that petitioner was personally liable for the withheld federal trust fund taxes under Section 6672. Pet. App. 7a.

The court of appeals noted that, under the two-pronged test for liability under Section 6672, a person is liable for unpaid trust fund taxes if he is "(1) a responsible person (2) who has willfully failed to perform a duty to collect, account for, or pay over federal employment taxes." Pet. App. 6a (citing 26 U.S.C. 6672(a)). The court held that the undisputed facts showed that petitioner was responsible for paying over the withheld taxes, because petitioner was a corporate officer with authority to disburse corporate funds, to hire and fire employees, and to participate in all corporate decisions. During the relevant period, he also had a substantial ownership interest in the company. Pet. App. 3a-5a. The court noted that the fact that another officer may *also* have had liability as a responsible person did not preclude petitioner's liability under this statute, for it is well established that a company may have more than one responsible person. *Id.* at 7a-8a (citing *Thibodeau* v. *United States*, 828 F.2d 1499, 1503 (11th Cir. 1987)). The court also noted that petitioner had ample authority to make payments on corporate accounts, either in conjunction with Umphrey or on his own through a series of small checks on other accounts. Pet. App. 8a (citing *Gustin* v. *United States IRS*, 876 F.2d 485, 492 (5th Cir. 1989)).

The court of appeals next concluded that the undisputed facts established the second, or willfulness prong of the Section 6672 test. Pet. App. 9a-11a. Petitioner testified that, after he became aware of the trust-fund arrearages in August 1995, his attempts to pay them were suspended on the orders of Garner Umphrey. *Id.* at 9a. The court noted that this "Nuremburg defense"

has consistently been rejected by the courts. *Id.* at 9a-10a (citing *Brounstein* v. *United States*, 979 F.2d 952, 956 n.5 (3d Cir. 1992); *Roth* v. *United States*, 779 F.2d 1567 (11th Cir. 1986)). Moreover, the evidence showed that, during the period when he was aware of the unpaid trust-fund taxes, petitioner in fact authorized several payments of corporate funds to other creditors, including payments to himself and to a company partly owned by his wife. Pet. App. 10a-11a. The court held that this undisputed evidence was plainly sufficient under Section 6672 to establish that petitioner had "willfully" failed to pay over the withheld trust fund taxes as a matter of law. *Ibid.*

Finally, the court of appeals addressed petitioner's argument, based on *Finley* v. *United States*, 123 F.3d 1342 (10th Cir. 1997), that he had reasonable cause for his failure to pay over the trust-fund taxes. The court noted that the Eleventh Circuit had not decided whether a "reasonable cause" defense to Section 6672 liability would be available and that there was no reason for the court "to address this issue today." Pet. App. 11a. Instead, the court agreed with the Fifth Circuit in *Bowen* v. *United States*, 836 F.2d 965, 968 (1988), which held on similar facts that, even if a reasonable cause defense to Section 6672 liability exists, it would not be available to "a responsible person who knew that the withholding taxes were due, but who made a conscious decision to use corporate funds to pay creditors other than the government." Pet. App. 11a (citing *Bowen* v. *United States*, 836 F.2d at 968; *Newsome* v. *United States*, 431 F.2d 742, 746 n.11 (5th Cir. 1970); *Frazier* v. *United States*, 304 F.2d 528, 530 (5th Cir. 1962)). The court noted that, even in circuits that have recognized a "reasonable cause" defense under Section 6672, that defense has been confined to narrow fact

patterns that bear no resemblance to the undisputed facts of petitioner's case. Pet. App. 12a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Employers are required to withhold Federal Insurance Contributions Act (FICA) and federal income taxes from employees' wages and remit the withheld amounts to the Internal Revenue Service. 26 U.S.C. 3102(a), 3402(a). The funds withheld from employee wages are held in trust for the United States. 26 U.S.C. 7501(a); *Slodov* v. *United States*, 436 U.S. 238, 243 (1978); *Smith* v. *United States*, 894 F.2d 1549, 1552-1553 (11th Cir. 1990); *Howard* v. *United States*, 711 F.2d 729, 733 (5th Cir. 1983). Unfortunately, troubled businesses often find the trust funds they collect to be "a tempting source of ready cash" and they unlawfully use the money to pay creditors in an effort to keep the failing corporation in operation. *Slodov* v. *United States*, 436 U.S. at 243.

Congress enacted Section 6672 of the Internal Revenue Code, 26 U.S.C. 6672, to prevent this misuse of trust-fund taxes to prop up failing businesses. Under this statute, a individual is personally liable for the amount of unpaid trust-fund taxes if (i) he is "responsible" for collecting and paying over the tax; and (2) he "willfully fails to collect such tax, or truthfully account for and pay over such tax * * * ." 26 U.S.C. 6672(a). See, *e.g.*, *Winter* v. *United States*, 196 F.3d 339, 344 (2d Cir. 1999); *Plett* v. *United States*, 185 F.3d 216, 218-219 (4th Cir. 1999); *United States* v. *Kim*, 111 F.3d 1351,

1357 (7th Cir.); *Mazo* v. *United States*, 591 F.2d 1151, 1153 (5th Cir.), cert. denied, 444 U.S. 842 (1979).

Petitioner does not claim that he was not "responsible" for paying over the withheld taxes during the relevant periods. Instead, he claims (Pet. 9-15) that he did not "willfully" fail to do so. The term "willfully" as used in Section 6672 connotes "a voluntary, intentional violation of a known legal duty." See *Cheek* v. *United States*, 498 U.S. 192, 200 (1991) (quoting *United States* v. *Bishop*, 412 U.S. 346, 360 (1973)). For purposes of Section 6672, a person acts "willfully" when he pays other creditors with corporate funds while knowing that the trust fund taxes owed to the United States remain unpaid; the statute does not require any other showing of fraudulent intent or bad motive on the responsible person's part. See, *e.g.*, *Vinick* v. *Commissioner*, 110 F.3d 168, 173 (1st Cir. 1997); *Buffalow* v. *United States*, 109 F.3d 570, 573 (9th Cir. 1997); *United States* v. *Rem*, 38 F.3d 634, 643 (2d Cir. 1994); *Barnett* v. *IRS*, 988 F.2d 1449, 1457 (5th Cir.), cert. denied, 510 U.S. 990 (1993); *Williams* v. *United States*, 931 F.2d 805, 810 (11th Cir. 1991).

The undisputed evidence plainly establishes that, under this accepted standard, petitioner acted "willfully" by failing to pay over the withheld trust fund taxes in this case. During the period that petitioner was fully aware of the outstanding unpaid trust fund taxes owed to the United States, petitioner did not pay those taxes and, instead, paid other creditors including himself and his wife's company. Pet. App. 10a-11a. As the courts below concluded, these undisputed facts establish petitioner's liability under Section 6672 as a matter of law. *Ibid.*

2. Petitioner errs in claiming (Pet. 9-13) that the decision in this case conflicts with the decision of the

Tenth Circuit in *Finley* v. *United States*, 123 F.3d 1342, 1346-1348 (1997), which recognized a "reasonable cause" defense to Section 6672 liability. The court of appeals correctly and expressly declined to address the asserted "reasonable cause" defense to responsible person liability because that defense would be unavailable to petitioner even under the standards followed by circuits that recognize such a defense. Pet. App. 11a.

In *Finley*, a corporate president ordered the treasurer of the corporation to pay outstanding trust fund taxes and only discovered that his order had not been carried out when funds were no longer available to make the payment. 123 F.3d at 1343-1344. The Tenth Circuit held that these facts brought the president within a "reasonable cause exception" to Section 6672 liability. *Id.* at 1348. The court stated that this exception was to be "narrowly construe[d]" and would be confined to situations in which "(1) the taxpayer has made reasonable efforts to protect the trust funds, but (2) those efforts have been frustrated by circumstances outside the taxpayer's control." *Ibid.* Because the jury had not been instructed on "reasonable cause," the court remanded the case for a new trial. *Id.* at 1350.

The Second Circuit has recognized a version of the "reasonable cause" defense, stating that a responsible person may avoid liability if he shows that he reasonably believed that the trust-fund taxes were in fact being paid. *Winter* v. *United States*, 196 F.3d at 345. The First, Seventh, and Ninth Circuits, however, have refused to recognize a "reasonable cause" defense to Section 6672 liability. *Harrington* v. *United States*, 504 F.2d 1306, 1315-1316 (1st Cir. 1974); *Pacific National Ins. Co.* v. *United States*, 422 F.2d 26, 33 (9th Cir.), cert. denied, 398 U.S. 937 (1970); *Monday* v. *United States*, 421 F.2d 1210, 1216 (7th Cir.), cert. denied, 400 U.S. 821

(1970). In holding that no reasonable cause defense exists under Section 6672, the Seventh Circuit observed that such a defense would invite the fact finder to consider "misleading and improper factors" such as the business's financial difficulties, and would be "inconsistent with the purposes of Congress to protect the sources of revenue by permitting recovery from those individuals charged with the responsibility of transferring withheld funds to the Government." *Monday* v. *United States*, 421 F.2d at 1216. The First Circuit, in *Harrington*, agreed with the Seventh Circuit's reasoning, noting also that the use of "reasonable cause" language in other Code provisions (*e.g.*, 26 U.S.C. 6651(a)(1), 6652(a), 6656(a)) strongly indicates that the omission of that term in Section 6672 was deliberate. 504 F.2d at 1316.

The Fifth Circuit has "recognized conceptually" that a reasonable cause exception may exist but, as the court observed in *Bowen*, "no taxpayer has yet carried that pail up the hill." 836 F.2d at 968. See *Logal* v. *United States*, 195 F.3d 229, 233 (5th Cir. 1999) (responsible person who knew of failure to pay withholding taxes yet paid other creditors lacks any "reasonable cause"). In particular, the *Bowen* court held that a "reasonable expectation of sufficient funds at a later date"—based on assurances from a bank officer that the bank would give the company a loan to pay its trust fund taxes —would not constitute reasonable cause or negate Section 6672 liability. 836 F.2d at 968. See *Howard* v. *United States*, 711 F.2d 729, 736 (5th Cir. 1983) (an order from a superior not to pay a company's trust-fund taxes does not provide a reasonable cause defense).

The only "reasonable cause" that petitioner points to in this case (Pet. 13) is that Garner Umphrey assertedly overruled his efforts to make certain payments towards

the trust-fund tax liability. This incident falls far short of constituting "reasonable cause" even under the standards articulated by the circuits that may recognize such a defense. For example, in this case, unlike in *Finley*, 123 F.3d at 1349, petitioner knew that the taxes remained delinquent during the period that he authorized other uses of corporate funds. Pet. App. 4a. Moreover, here, unlike in *Finley*, even after knowingly suspending payments to the government, petitioner wrote checks on the corporate accounts to pay himself and other creditors of the corporation, including his wife's company. *Id.* at 3a-4a. Indeed, during the period from August to November 1995, when petitioner admits that he was aware of the continuing deficiency in the payment of the trust fund taxes, petitioner signed or co-signed at least 262 checks on the company's accounts. *Id.* at 5a, 10a. A "reasonable cause" exception clearly would not apply in the circumstances present in this case—where petitioner could have made substantial payments toward the trust-fund tax liability but chose not to do so.[2] See, *e.g.*, *Gustin* v. *United States IRS*, 876 F.2d at 492 (although responsible person had check-writing authority "limited to relatively small amounts," he was liable for his failure to exercise that authority to pay a portion of the trust-fund taxes and for dissipating the trust fund by paying other creditors); *Howard* v. *United States*, 711 F.2d at 736 (orders from a superior do not constitute "reasonable cause").

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[2] Similarly, the Second Circuit in *Winter* v. *United States*, 196 F.3d at 345, held that a responsible person who reasonably believed trust-fund taxes were being paid could escape liability. In this case, petitioner conceded that, even after he was aware of the unpaid liability, he continued to sign checks to pay other creditors. Pet. App. 4a-5a.

3. Petitioner also mistakenly argues (Pet. 14-15) that the decision in this case conflicts with *Ratzlaf* v. *United States*, 510 U.S. 135 (1994). *Ratzlaf* involved a provision of the Currency and Foreign Transactions Reporting Act (since revised) that provided criminal penalties for one who "willfully violate[s]" the act by structuring cash transactions to fall below reporting limits. 510 U.S. at 136-138; 31 U.S.C. 5322(a), 5324(a)(3).[3] The Court held that the "willfulness" element of this criminal offense requires the government to prove that the defendant knew that the restructuring was unlawful. 510 U.S. at 149. Petitioner asserts that, since Section 6672 was once a criminal statute and "retains its penal nature," *Ratzlaf* requires the courts to recognize a defense for responsible persons who make a "good faith effort" to pay trust-fund taxes. Pet. 14-15.

This argument fails because, as courts have repeatedly held, 26 U.S.C. 6672 is a civil, not a criminal statute. See, *e.g.*, *Vinick* v. *Commissioner*, 110 F.3d at 173; *Denbo* v. *United States*, 988 F.2d 1029, 1034 (10th Cir. 1993); *Kalb* v. *United States*, 505 F.2d 506, 510 (2d Cir. 1974), cert. denied, 421 U.S. 979 (1975); *Monday* v. *United States*, 421 F.2d at 1215 (contrasting the meaning of "willfulness" in civil and criminal statutes); *Emshwiller* v. *United States*, 565 F.2d 1042, 1045 (8th Cir. 1977); *United States* v. *Molitor*, 337 F.2d 917, 924 (9th Cir. 1964). Rather than punishment, Congress's purpose in enacting Section 6672 was to provide the government with an alternative source to collect trust fund taxes that have been withheld from, and credited

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[3] Congress amended 31 U.S.C. 5324 in 1994 to remove the reference to the "willfulness" requirement of Section 5322. Pub. L. No. 103-325, § 411, 108 Stat. 2253. See *United States* v. *Zehrbach*, 47 F.3d 1252, 1262 n.7 (3d Cir.), cert. denied, 514 U.S. 1067 (1995).

to, employees. *Slodov* v. *United States*, 436 U.S. at 243; *Winter* v. *United States*, 196 F.3d at 344; *Finley* v. *United States*, 123 F.3d at 1348; *Emshwiller* v. *United States*, 565 F.2d at 1045. Interpretations of the term "willful" as used in criminal statutes thus have little relevance to Section 6672. See, *e.g.*, *Monday* v. *United States*, 421 F.2d at 1215. Moreover, no appellate decision supports petitioner's contention and there is thus no conflict to warrant certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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